

# Cultivating Farmworker Injustice: The Resurgence of Sharecropping

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*Certain industries in the United States have always relied upon inexpensive, undemanding, and plentiful immigrant workforces. This reliance on outside labor is most notable in the agricultural industry. Indeed, from the southern plantations fueled by slave labor to the strawberry fields on the West Coast tended by Japanese farmers, much of the agricultural work in this country has been performed by newly—and involuntarily—arrived populations who lack the freedom or ability to seek other means of support. With immigration from other countries, Mexico in particular, on the rise, it is no surprise that many Hispanic immigrants are finding work in the agricultural industry. What is surprising is that despite the enactment of laws geared toward protecting these workers, they are finding themselves little better off than their predecessors. The difficulties that immigrant farmworkers continue to face are due in part to employers' efforts to evade the requirements of protective legislation by labeling their farmworkers as independent contractors in sharecropping contracts.*

## I. INTRODUCTION

Lured by the possibility of achieving the independence that they had sought, the Ramirez family of Salinas, California, entered a contract with a local vegetable broker, Veg-a-Mix, that seemed to offer the family a chance to finally “own[ ] [their] own farm and earn[ ] a living from it.”<sup>1</sup> Under the contract, the Ramirez family received a loan from Veg-a-Mix to grow zucchini and in return promised to sell their crops exclusively through the broker.<sup>2</sup> After working under these contracts for several years, however, the Ramirez family has nothing to show for their hard work except a debt to Veg-a-Mix for approximately \$65,000.<sup>3</sup>

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\* This note is dedicated with love to my parents, David and Treacy Manion.

<sup>1</sup> The story of the Ramirez family and their experiences working under a sharecropping contract was featured in a report by Chris Arnold, *Hispanic Farmers Getting Trapped in Business Deals Similar to the Days of Sharecropping* (NPR Morning Edition radio broadcast, Aug. 17, 2000), available at [www.npr.org/ramfiles/me/20000817.me.ram](http://www.npr.org/ramfiles/me/20000817.me.ram).

<sup>2</sup> *Id.* The loans the family receives each year amount to tens of thousands of dollars and are used for planting and fertilizing costs.

<sup>3</sup> *Id.* According to Javier Ramirez, whose father entered the Veg-a-Mix contract, the broker informed them that the money from the zucchini they had grown was applied towards their loan. Javier's father, who speaks only Spanish, is the only family member who has seen the contract, which is written entirely in English. Despite working for the broker for several years, the family has not been able to pay off its debts or receive any profits from their work. Instead, the family depends on the money that Javier's mother earns packing broccoli for another agricultural company. *Id.*

The arrangement that the Ramirez family entered with Veg-a-Mix has apparently become quite common among Hispanic farmworkers in California,<sup>4</sup> but "language barriers and a lack of experience with the business side of farming" have resulted in many farmers losing rather than making money in the deals.<sup>5</sup> With farmers winding up in debt to their brokers and thus remaining obligated to continue working under contracts that are unlikely to become profitable, there appears to be a resurgence of sharecropping in the California agricultural industry.<sup>6</sup>

Thought by many to be a practice of the post-Civil War past, where former plantation owners devised sharecropping arrangements in order to keep former slaves in perpetual servitude—and poverty<sup>7</sup>—sharecropping has emerged as an employment system in the contemporary agricultural industry.<sup>8</sup> While sharecropping arrangements have resulted in success for some,<sup>9</sup> the arrangements

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<sup>4</sup> *Id.* According to Mike Meuter, an attorney who directs the Salinas branch of California Rural Legal Assistance (CRLA), a non-profit legal organization, some agricultural companies "actively recruit" farmers for these contracts, "tak[ing] them out to dinner and offer[ing] to help them start their own family farm." *Id.* Updated information about the work CRLA does on behalf of farmworkers is available at the organization's website, [www.crla.org](http://www.crla.org). *Id.*

<sup>5</sup> *Id.* Arnold's story also featured Salvador Serrano, who entered into a strawberry contract that resembled the Ramirezes'. After Serrano incurred debts to his broker instead of profits, the California Department of Agriculture investigated and found that the broker "had swindled Salvador Serrano over ten years and . . . owed him more than a hundred thousand dollars." *Id.* Although the broker disappeared before Serrano could collect the money it owed him, Serrano's alleged debt to the broker was cancelled. *Id.*

<sup>6</sup> *Id.* ("[M]any Hispanic farmers are getting trapped in business deals reminiscent of the days of sharecropping.").

<sup>7</sup> Michael Parrish, *Betting on Hard Labor and a Plot of Land*, L.A. TIMES, July 7, 1995, at A1.

<sup>8</sup> Arnold, *supra* note 1. The words "sharecropping" and "sharefarming" are used interchangeably to refer to the situation described in this note. See Jeanne M. Glader, Note, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455, 1455 n.2 (1991). This note will use the terms "sharecropping" and "sharecroppers."

<sup>9</sup> See Parrish, *supra* note 7. Parrish's story featured Hipolito Meza, a welder and machinist who had spent five years on a waiting list with GSB, a California agricultural company, before entering a sharecropping agreement for strawberries, a crop which is commonly the subject of sharecropping contracts. In his first year as a sharecropper, Meza's earnings exceeded his prior annual income of \$60,000. Parrish also cites examples of sharecroppers who have paid their children's college tuitions and traveled in Europe with their earnings. Unlike others who enter sharecropping contracts, Meza was well-informed about the risks involved, having "read a lot about old-time sharecropping." *Id.* Meza most likely also benefited from the experience of his father-in-law, who was a sharecropper for eighteen years with a well-known agricultural employer, Driscoll Strawberry Associates, Inc. *Id.* Driscoll Strawberry Associates was one of the defendants in a Fair Labor Standards Act challenge to sharecropping contracts, *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979). See *infra* notes 60–76 and accompanying text.

also provide numerous opportunities for abuse, as is frequently the case when the sharecroppers are immigrants who are unfamiliar with the contractual terms, their legal rights, and the English language.<sup>10</sup>

This note examines the use of sharecropping arrangements with immigrant farmworkers and the problems and abuses that arise from such arrangements. Part II examines the history and development of sharecropping in American agriculture and offers some reasons for sharecropping's current popularity. Part III discusses current sharecropping arrangements that immigrant farmworkers have entered and the difficulty of complying with the contract's terms. Part IV discusses the legislative response to recognized abuses of farmworkers, the application of protective legislation by courts, and the overall ineffectiveness of current means of protecting sharecroppers.<sup>11</sup> Part V suggests reasons why legislative and judicial remedies thus far have not been effective. Part VI proposes legal as well as social changes to assist this group of farmworkers.

## II. THE HISTORY, DEVELOPMENT, AND CURRENT POPULARITY OF SHARECROPPING

A sharecropping contract divides responsibilities for raising an agricultural product between the supplier of labor and the supplier of capital.<sup>12</sup> In a traditional sharecropping arrangement, a farmworker agrees with a landowner to use his land, to run the farm independently, and to pay the owner with a percentage of the crops.<sup>13</sup> A landowner or agricultural business may also supply seed or equipment to a farmer who works to raise the crop with the understanding that the two parties will share the profits of the harvest.<sup>14</sup>

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<sup>10</sup> See Glader, *supra* note 8, at 1458; see also Arnold, *supra* note 1.

<sup>11</sup> See Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801–1872 (1994). The Act has been referred to as “MSPA,” “MSAWPA,” and “AWPA” in case law and law review articles. This note will refer to the statute as AWP in keeping with the Supreme Court’s use of the acronym in *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638 (1990), the only Supreme Court case dealing with AWP to date. See *Antenor v. D & S Farms*, 88 F.3d 925, 928 n.3 (11th Cir. 1996).

<sup>12</sup> See Parrish, *supra* note 7; Arnold, *supra* note 1.

<sup>13</sup> Glader, *supra* note 8, at 1466.

<sup>14</sup> Parrish, *supra* note 7. This agreement to share the profits of a harvest is based on the premise that there will be profits. Owners in sharecropping deals have been able to avoid paying farmworkers by structuring transactions so that a worker’s share of the profits is first applied to pay off the owner’s initial loans of seed, equipment, or start-up money. The worker’s entire share of the profits may be used to pay these debts. Frequently, the debt to the owner exceeds the farmworker’s portion of the profits, so the worker is compelled to enter another contract with the owner. Thus, sharecropping arrangements create a cycle in which farmworkers continue to work hoping to make a profit, but instead frequently incur additional debt. *Id.*; see *supra* notes 1–6 and accompanying text (discussing sharecroppers Ramirez and Serrano).

Historically, sharecropping arrangements between landowners and farmworkers deliberately kept workers in debt and under a continuing obligation to landowners.<sup>15</sup> Although current use of sharecropping contracts by agricultural businesses has been criticized,<sup>16</sup> proponents of sharecropping claim that "between honest business partners," contracts established upon "a fair distribution of profit and risk" benefit farmworkers as well as the large businesses with which they deal.<sup>17</sup>

### A. *Post-Civil War Sharecropping*

Sharecropping arrangements—and their potential unfairness to farmworkers—can be traced back to the post-Civil War South,<sup>18</sup> when plantation owners hired former slaves to work as "tenant farmers."<sup>19</sup> By overcharging the farmworkers for the land they rented as well as other supplies that had been advanced to the farmers as part of the initial deal, landowners were able to ensure that the workers' debts exceeded their portion of the profits from the harvest.<sup>20</sup> In debt to the landowners, the farmworkers were bound to continue working under the same unfavorable terms with little chance of ever paying off their debts or becoming independent farmers.<sup>21</sup>

Sharecropping also was popular in California during the first half of the Twentieth Century.<sup>22</sup> Japanese American farmers who had been incarcerated during World War II entered into sharecropping deals in order to re-establish themselves as farmers or to earn enough money to pursue other business

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<sup>15</sup> Arnold, *supra* note 1.

<sup>16</sup> See *id.* (concluding that "everyone agrees that some dishonest companies are preying upon unsophisticated immigrants").

<sup>17</sup> Parrish, *supra* note 7.

<sup>18</sup> Jay R. Mandle, *Sharecropping and the Plantation Economy in the United States South*, in SHARECROPPING AND SHARECROPPERS 120–29 (T.J. Byres ed., 1983) (analyzing the rise of sharecropping as a substitute for the plantation labor system); see also Parrish, *supra* note 7.

<sup>19</sup> Arnold, *supra* note 1.

<sup>20</sup> Parrish, *supra* note 7.

<sup>21</sup> *Id.*

<sup>22</sup> See Miriam J. Wells, *Legal Conflict and Class Structure: The Independent Contractor-Employee Controversy in California Agriculture*, 21 LAW & SOC'Y REV. 49, 63 (1987) [hereinafter Wells, *Legal Conflict*] (stating that the "precedent" for sharecropping strawberries in California was established "by Japanese farmers who could not own land until the Alien Land Laws were repealed in 1954"); see also MIRIAM J. WELLS, STRAWBERRY FIELDS 110–12 (1993) [hereinafter WELLS, STRAWBERRY FIELDS].

opportunities.<sup>23</sup> Despite the potential for abuse, many of these farmworkers succeeded in making a profit from sharecropping.<sup>24</sup>

### B. Current Uses of Sharecropping Contracts

Sharecropping has reemerged in the agricultural industry in the form of labeling immigrant farmworkers as "independent contractors" instead of as employees.<sup>25</sup> A worker's classification as an independent contractor or employee is significant because the classification determines which legal protections apply to the worker.<sup>26</sup> By labeling farmworkers in sharecropping contracts "as independent contractors, agricultural employers are able to avoid the expense and inconvenience of complying with worker protection provisions of the Fair Labor Standards Act (FLSA), including health and safety standards, unemployment and disability insurance, and . . . protections against oppressive child labor."<sup>27</sup> Farmworkers who are classified as independent contractors are likewise precluded from the protections available under the National Labor Relations Act.<sup>28</sup>

Despite criticism of classifying workers in sharecropping agreements as independent contractors,<sup>29</sup> agricultural employers have succeeded in defending

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<sup>23</sup> See WELLS, STRAWBERRY FIELDS, *supra* note 22, at 113 (many Japanese Americans returned to sharecropping after being released from internment camps "to get their bearings and earn some money"); see also Parrish, *supra* note 7.

<sup>24</sup> Parrish, *supra* note 7. According to Tomio Tsuda, a former sharecropper interviewed in Parrish's article, sharecropping was "a fair deal" and "a good way of getting started" for many Japanese Americans who returned from internment camps or military service after World War II to find they had "lost everything." *Id.* Tsuda was able to purchase a car repair shop after working for three years as a strawberry sharecropper. *Id.*

<sup>25</sup> See Glader, *supra* note 8, at 1455. An independent contractor is defined as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." RESTATEMENT (SECOND) OF AGENCY § 2 (1958). The Restatement also lists ten "matters of fact" which, along with other factors, may be used to determine "whether one acting for another is a servant or an independent contractor." *Id.* § 220; see *infra* notes 65-72 and accompanying text.

<sup>26</sup> See Glader, *supra* note 8, at 1456; see also Arnold, *supra* note 1 (noting that "by setting up these immigrants as independent farmers, the [agricultural] companies avoid legal responsibility").

<sup>27</sup> Glader, *supra* note 8, at 1456 (footnote omitted).

<sup>28</sup> See 29 U.S.C. § 152(3) (1994) ("The term 'employee' . . . shall not include . . . any individual having the status of an independent contractor. . ."). The NLRA's definition of "employee" likewise excludes "any individual employed as a agricultural laborer." *Id.*

<sup>29</sup> See Marc Linder, *Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the "Law and Economics" Agency Doctrine*, 15 N.Y.U. REV. L. & SOC. CHANGE 435, 436 (1986-87) [hereinafter Linder, *Employees*] (arguing that agricultural workers should not be considered independent contractors because they are more dependent economically on their employers than any other group of workers).

this system by asserting either that farmworkers are independent contractors or the employees of independent crewleaders.<sup>30</sup>

Sharecropping contracts utilizing the independent contractor label are used by agricultural businesses throughout the country,<sup>31</sup> but they are predominately used in California by producers of labor-intensive crops, such as strawberries.<sup>32</sup> The contracts seem to appeal to Hispanic farmworkers, many of whom have worked as migrant farmers.<sup>33</sup> Like the former slaves in the South and the Japanese Americans in California before them, Hispanic farmworkers view sharecropping as a step toward independence and a way to advance economically.<sup>34</sup> Unfortunately, modern sharecroppers often find themselves in the same economic predicaments as their predecessors.<sup>35</sup> Sharecropping arrangements present a way for agricultural businesses to avoid responsibility under labor laws for sharecroppers who actually are employees despite their independent classification.<sup>36</sup> In fact, the agricultural businesses entering these contracts are very much in control of the work their supposedly independent contractors do.<sup>37</sup>

The development of sharecropping in the United States indicates that it is groups who are precariously situated socially, financially, and legally who are

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<sup>30</sup> See Jeanne E. Varner, Note, *Picking Produce and Employees: Recent Developments in Farmworker Injustice*, 38 ARIZ. L. REV. 433, 440 (1996). Varner's analysis of the independent contractor-employee debate focuses on *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994). In *Aimable*, the Eleventh Circuit applied the joint-employer doctrine to determine that Long & Scott was not liable to the migrant and seasonal workers who brought suit for unpaid wages. *Aimable*, 20 F.3d at 436-37, 445; see also Varner at 452-60. The *Aimable* court concluded that a crew leader, who was himself an independent contractor hired by Long & Scott, was the plaintiffs' true employer. *Id.* at 435.

<sup>31</sup> See MARC LINDER, *MIGRANT WORKERS AND MINIMUM WAGES* 217 (1992) [hereinafter LINDER, *MIGRANT WORKERS*] ("[S]harecropping [has], at various times, been imposed on migrants harvesting pickles in Ohio, Michigan, Wisconsin, Minnesota, Iowa, North Carolina, Texas, [and] Colorado, . . . cherries in Michigan [and] onions in Ohio.").

<sup>32</sup> Wells, *Legal Conflict*, *supra* note 22, at 50. Wells' analysis of sharecropping focuses on the California strawberry industry. Until the mid-1960s, most strawberry producers in California hired "wage laborers" to work on their farms. *Id.* By the mid-1970s, however, a significant percentage of strawberry farms in the state were using sharecroppers instead. *Id.* Wells explains that strawberry plants are particularly fragile and require constant maintenance throughout the growing season, so "workers must exert care, some skill, and judgment." *Id.* at 54; see also Parrish, *supra* note 7 (reporting that in California in 1995, approximately "40% of the strawberries [were] grown and harvested by sharecroppers").

<sup>33</sup> See Glader, *supra* note 8, at 1458. See generally Parrish, *supra* note 7; Arnold, *supra* note 1.

<sup>34</sup> See Parrish, *supra* note 7.

<sup>35</sup> See *supra* notes 1-6 and accompanying text.

<sup>36</sup> Glader, *supra* note 8, at 1467.

<sup>37</sup> See Linder, *Employees*, *supra* note 29, at 437; see also Arnold, *supra* note 1 (commenting that "often the broker company is essentially an employer in control of the farmer" and that companies "tell the farmers what to grow, how to grow it, and when to pick it").

drawn into sharecropping deals: African Americans after the Civil War, Japanese Americans who were precluded from owning land, and, currently, Hispanic immigrants during an era of much anti-immigration sentiment.<sup>38</sup> By looking at the prevalence of sharecropping among these groups, a pattern emerges in which members at the lower socio-economic level in agricultural communities become the victims of unfair sharecropping deals.<sup>39</sup> While some Hispanic farmers have succeeded through sharecropping,<sup>40</sup> those success stories usually involve farmers who are proficient in English and who have some business experience.<sup>41</sup> Groups with few to no legal rights who are also the targets of racial or ethnic prejudice suffer the most adverse consequences as sharecroppers.<sup>42</sup>

### III. CURRENT SHARECROPPING CONTRACTS

The structure of a sharecropping arrangement is generally set by a contract that states the "status, rights, and obligations of each party."<sup>43</sup> A sharecropping agreement generally classifies a worker as an independent contractor.<sup>44</sup> Because farmworkers who are labeled "as 'independent contractors' do not fall within the FLSA definition of 'employee,' growers are not required to provide such workers

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<sup>38</sup> See Wells, *Legal Conflict*, *supra* note 22, at 63 (discussing Japanese sharecroppers); Glader, *supra* note 8, at 1458 (discussing Hispanic sharecroppers); Harry Valetk, Note, "I Cannot Eat Air!": An Economic Analysis of International Immigration Law for the 21st Century, 7 CARDOZO J. INT'L & COMP. L. 141, 144-45 (1999) (discussing recent anti-immigrant sentiments); Parrish, *supra* note 7 (discussing African American sharecroppers); Arnold, *supra* note 1 (discussing African American and Hispanic sharecroppers).

<sup>39</sup> See EDWARD ROYCE, THE ORIGINS OF SOUTHERN SHARECROPPING 75 (1993) (After the Civil War, "[p]lanters used labor contracts to reassert the multifaceted authority they had possessed under slavery."); see also WELLS, STRAWBERRY FIELDS, *supra* note 22, at 110-12; Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 414 (1995) (noting "the legitimization of anti-immigrant and racist sentiment in the current political climate").

<sup>40</sup> See *supra* note 9 (describing Hipolita Meza, who earned over \$60,000 during his first year as a sharecropper); see also *supra* note 24 (discussing Tomio Tsuda, a Japanese American who worked as a sharecropper after losing his property during World War II).

<sup>41</sup> See *supra* note 9. Meza had lived in the United States for most of his life, spoke English fluently, and had worked as a machinist and welder before becoming a sharecropper. Meza's prior work experience and research of the potential risks involved in sharecropping undoubtedly assisted him in finding a fair contract to enter. Recent immigrants with minimal language abilities, who do not have alternative jobs upon which to rely until they find fair sharecropping contracts, are more likely to be taken advantage of by dishonest agricultural companies. See also *supra* note 24. Tsuda, like Meza, had lived in the United States and spoke English when he worked as a sharecropper. Although Tsuda was starting over and apparently had to contend with the anti-Japanese sentiments that were prevalent at the time, his prior experience in the United States most likely helped him to avoid losing money under his sharecropping contract.

<sup>42</sup> See *supra* note 39 and accompanying text.

<sup>43</sup> Wells, *Legal Conflict*, *supra* note 22, at 65.

<sup>44</sup> Glader, *supra* note 8, at 1455-56.

with any of the protections the Act affords.”<sup>45</sup> In a typical agreement, the landowner agrees to “furnish and prepare the land; plant the crop; cultivate, spray, and fertilize the crop; and pay all the costs incurred with respect thereto.”<sup>46</sup> The sharecropper in the agreement promises to “furnish the labor necessary to care for the land and plants during the growing season, to harvest the . . . crop, and to sort, grade and pack the [crop] for marketing by [the grower].”<sup>47</sup> After selling the crop, the sharecropper and landowner share the proceeds.<sup>48</sup>

### A. *The Questionable Independence of Sharecroppers*

Although the sharecropping agreement is structured to give the farmworker a level of independence beyond that of an employee, the validity of the independent contractor classification is questionable.<sup>49</sup> In addition to the accuracy of applying the term “independent contractor” to an immigrant farmworker, the unequal balance of power between the parties makes these agreements suspect.<sup>50</sup> Rather than freely choosing to enter these agreements, “[w]orkers often sign these independent contractor agreements only because they are forced to as a condition of employment.”<sup>51</sup> Farmworkers have “little control over the care and management of the . . . operation” in the majority of sharecropping contracts.<sup>52</sup>

The unequal power of the contracting parties is obvious from the terms of many of these contracts. In many agreements, “[t]he farmer has to pay interest on the loan[;] . . . pay the broker for refrigeration when the produce is delivered[; and] . . . often even has to buy the cardboard boxes to put the fruit in exclusively from the broker.”<sup>53</sup> These conditions virtually guarantee the broker will make a profit.<sup>54</sup>

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<sup>45</sup> *Id.* at 1456.

<sup>46</sup> *Id.* at 1455.

<sup>47</sup> *Id.* at 1455–56 (alteration in original).

<sup>48</sup> *Id.* at 1456.

<sup>49</sup> *Id.* at 1483 (stating that there is “no valid socio-economic or legal reason . . . for classifying cotton-hoers as self-employed business people”) (quoting Linder, *Employees*, *supra* note 29, at 438 n.15).

<sup>50</sup> *See id.* at 1466–67 (“Characteriz[ing] the migrant worker as an independent business person contracting freely with the grower is an extremely inaccurate portrayal of the true balance of power in the working relationship”).

<sup>51</sup> *Id.* at 1467; *see also* Steve Etka, *Contract Agriculture: Serfdom in Our Time*, at <http://www.sustainableagriculture.net/sustnews.html> (last visited Sept. 7, 2001) (discussing “contract agriculture” and stating that often “growers discover how vulnerable they have become to the take-it-or-leave-it terms of the contracts”).

<sup>52</sup> Glader, *supra* note 8, at 1466.

<sup>53</sup> Arnold, *supra* note 1.

<sup>54</sup> *Id.*



Language barriers also pose significant problems when farmworkers enter sharecropping contracts.<sup>55</sup> Spanish-speaking farmworkers who sign contracts written in English may not understand the obligations they are assuming, and not all agricultural companies attempt to explain the terms of the agreements.<sup>56</sup> Because many farmworkers “don’t understand the contract[,] [they] can be taken advantage of.”<sup>57</sup>

B. *Real v. Driscoll Strawberry Associates and Donovan v. Brandel: Courts’ Inconsistent Application of the Independent Contractor Analysis*

Challenges to contracts that classify immigrant farmworkers as independent contractors have had varying success. In *Real v. Driscoll Strawberry Associates (DSA)*,<sup>58</sup> Mexican American farmworkers sued a large California strawberry grower.<sup>59</sup> The Ninth Circuit examined the nature of the working relationship between the farmworkers and the strawberry grower in addition to the contractual language and found evidence sufficient to “undercut[] the [grower’s] assertion that the [farmworkers were] independent contractors.”<sup>60</sup>

The contract governing the relationship between the workers and the grower in *Real v. DSA* was called a “Patent Sublicense and Subcontract for Growing Strawberry Crop with Sublicensee.”<sup>61</sup> Although the court did not directly question

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<sup>55</sup> See Arnold, *supra* note 1.

<sup>56</sup> *Id.* Arnold interviewed a representative of Veg-a-Mix, a California vegetable broker that frequently deals with immigrants. The representative acknowledged that although their contracts are written in English, they contain a disclaimer “written in Spanish” admonishing farmworkers to have someone translate the contract and to be sure to understand it. The representative also stated that “maybe they (farmworkers) don’t read English, but their kids do.” *Id.* Since refusing to sign a contract or bargaining for better terms are not options for an immigrant farmer in need of work, it makes little difference whether the farmer understands the terms of the contract or not. In addition, relying on children to understand and translate a contract for their parents does not constitute a reasonable business practice.

<sup>57</sup> *Id.*; see also Wells, *Legal Conflict*, *supra* note 22, at 65. Wells writes that according to interviews and court affidavits filed by sharecroppers, many “do not understand the detailed terms of the contract.” *Id.*

<sup>58</sup> *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748 (9th Cir. 1979).

<sup>59</sup> See *Real*, 603 F.2d at 748. For a different perspective on Driscoll’s strawberry sharecropping contracts, see *supra* note 9.

<sup>60</sup> *Real*, 603 F.2d at 755. The farmworkers in *Real* appealed the decision of the district court granting summary judgment to the grower. *Id.* at 750. Although the farmworkers’ original complaint included charges of antitrust and contract violations, the complaint was later amended to include wage violations under the FLSA. *Id.* The FLSA violation was based on the allegation that the agreement between the farmworkers and DSA was a “sham.” *Id.* The FLSA violation was the only issue the farmworkers appealed. For a discussion of the original and amended complaint of the farmworkers in *Real*, see Wells, *Legal Conflict*, *supra* note 22, at 66–69.

<sup>61</sup> *Real*, 603 F.2d at 750.

the ability of the workers to understand the intricacies of the "Patent Sublicense and Subcontract," the court did note that

[t]he Agreement, written in English, consists of seventeen, legal-size pages containing much legal terminology. The appellants, all Spanish-speakers, allegedly never have mastered the English language. In most cases, a sublicensee signs the Agreement only once. Thereafter, the parties annually extend the Agreement by means of a one to two-page "addendum" signed by [the parties].<sup>62</sup>

The agreement repeatedly referred to the sublicensees as "independent contractor[s]" and stated that none of the other parties "has assumed under this agreement any rights of supervision and control over the growing of said strawberry crop."<sup>63</sup>

By classifying the farmworkers as "independent contractors" and "parrot[ing] language in cases distinguishing independent contractors from employees," DSA apparently was attempting to avoid entering a traditional employer-employee relationship with the workers, which would have required compliance with the FLSA.<sup>64</sup> The *Real* court stated, however, that "contractual language . . . [was] not conclusive in the circumstances presented . . ."<sup>65</sup> As did previous courts addressing the issue of whether a worker was an independent contractor or employee, the court examined the "[e]conomic realities, not contractual labels" of the *Real*-DSA working relationship.<sup>66</sup>

Of the economic realities that were relied upon to reverse the lower court's decision that the farmworkers were not employees, the element of control appears to have been the most important.<sup>67</sup> The defendant had "substantial control over important aspects of the [plaintiffs'] work," including the ability to fire a worker.<sup>68</sup> According to the farmworkers' affidavits, a foreman controlled their "activities in growing and harvesting the strawberries, especially in operations requiring substantial business judgment."<sup>69</sup>

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<sup>62</sup> *Id.* at 750 n.1. The workers, (referred to as "Sub-licensees"), a "Contractor," Donald J. Driscoll, and the "third-party beneficiary" DSA all signed the Agreement. *Id.* at 750.

<sup>63</sup> *Id.* at 751.

<sup>64</sup> *See id.* at 755.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729-30 (1947) and its analysis of the employment relationship under the FLSA).

<sup>67</sup> *Id.* at 750, 755.

<sup>68</sup> *Id.* at 755.

<sup>69</sup> *Id.* at 752-53. The foreman decided when farmworkers would fertilize, prune, weed, and pick their strawberries and acted as a supervisor of the farmworkers. *Id.* at 753 n.11 (citing an excerpt of the farmworkers' affidavits). The foreman, referred to as Mukai, surveyed the work sharecroppers had done and made them replant improperly placed berry plants; he also telephoned workers who had not arrived on time during picking hours or had not properly weeded their plots. A worker explained that when he had questioned any of the foreman's decisions, the foreman "always lets me know that he can take the strawberries away from me

The court looked at other factors in the working relationship, including (1) the farmworkers' "opportunity for profit or loss depending upon . . . managerial skill;" (2) the parties' "investment in equipment or materials required;" (3) "whether the service rendered requires a special skill;" (4) "the degree of permanence of the working relationship;" and (5) "whether the service rendered is an integral part of the alleged employer's business."<sup>70</sup> As with the element of control, these elements likewise supported a finding that the farmworkers were not independent of the foreman or DSA.<sup>71</sup>

The facts of *Real v. DSA* allowed no other conclusion but that the plaintiffs were employees of the defendant, despite contractual attempts to classify them as independent contractors. Although many contracts establishing sharecropping arrangements are analyzed according to the *Real* factors, courts do not always reach the same conclusion.<sup>72</sup> These agreements propose to set up workers and owners as two independent parties, but looking at the circumstances and the economic reality of the situations reveals that the owners are actually employing the workers and are using the independent classification to avoid their legal responsibilities to their employees.<sup>73</sup>

In *Donovan v. Brandel*, a sharecropping contract challenge brought by the Department of Labor (DOL), the Sixth Circuit applied the same six factors as the Ninth Circuit in *Real v. DSA*,<sup>74</sup> but concluded that the farmworkers were

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and that I have to do what he says. It is my personal understanding that if [the foreman] does not like the way I am using my plot, he can fire me." *Id.* The ability of the farmworkers to "hire and control" helpers during busy times under the agreement did not interfere with the substantial control exercised by DSA over the majority of the farmworkers' activities. *Id.* at 755.

<sup>70</sup> *Id.* at 754. The court noted that these were only some of the factors used by courts for "distinguishing employees from independent contractors for purposes of social legislation such as the FLSA." *Id.*; see also Glader, *supra* note 8, at 1475-76, discussing the six factor test used in *Real*.

<sup>71</sup> *Real*, 603 F.2d at 755.

<sup>72</sup> See *Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984) (analyzing a sharecropping contract under the six *Real* factors).

<sup>73</sup> See Arnold, *supra* note 1. According to the author:

[B]y setting up these immigrants as independent farmers, the vegetable-broker companies avoid legal responsibility for regulations . . . 'they have a perfect defense that if any claims come up, they stop at the supposed independent grower instead of going up above to an entity with deeper pockets that may actually be in control . . . [T]hey serve as a shield to legal liability.

*Id.*

<sup>74</sup> *Brandel*, 736 F.2d at 1117 & n.5 (listing the six factors used for determining employee or independent contractor status).

independent contractors rather than employees of the farm owner.<sup>75</sup> The sharecroppers in *Brandel* were hired to harvest cucumbers, a labor-intensive task.<sup>76</sup> The defendant farm owner claimed to have used a sharecropping arrangement with the workers in order to "delegat[e] to the migrant workers the responsibility of supervising their own field labor."<sup>77</sup>

The court accepted the rationale that by using a sharecropping agreement, where workers are paid based on profits earned rather than at a fixed hourly rate, the farmworkers would be motivated to use greater care in their harvesting.<sup>78</sup> This care and "knowledge of . . . methods of maximizing production constituted a skill," indicating greater independence than employee farmworkers would possess.<sup>79</sup> Despite the care farmworkers had to exercise, the actual skill required to harvest cucumbers seems to be minimal because children of the workers actively assisted their parents in the fields.<sup>80</sup> A skill that children readily develop cannot be so specialized that it precludes an employment relationship.<sup>81</sup>

The workers' capital investment is a second factor that the *Brandel* court incorrectly used to support its decision that the farmworkers were independent contractors rather than employees.<sup>82</sup> The *Brandel* workers supplied their own gloves and pails, which the court characterized as the workers' "capital investment."<sup>83</sup> *Brandel*, in contrast, had invested in a grading station, tractors, trucks, and an irrigation system.<sup>84</sup> The court noted the disparity between *Brandel's* and the workers' overall capital investments, but then separated the

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<sup>75</sup> *Id.* at 1120 ("[v]iewing the entire circumstances of the relationship" and "construing the term 'employee' with reference to the purposes of the FLSA," the court affirmed that the workers were not employees); see also LINDER, MIGRANT WORKERS, *supra* note 31, at 235-42.

<sup>76</sup> See *Brandel*, 736 F.2d at 1116.

<sup>77</sup> *Id.* at 1118; see also Linder, *Employees*, *supra* note 29, at 468.

<sup>78</sup> *Brandel*, 736 F.2d at 1118. Presumably, making farmworkers' earnings depend upon the quality of their labor avoids the cost of field supervision. See ROYCE, *supra* note 39, at 8. A farmworker with "an interest in the crop and an incentive to work diligently" creates less "supervision costs" for the landowner. *Id.* For criticism of the Sixth Circuit's analysis of the skill factor, see LINDER, MIGRANT WORKERS, *supra* note 31, at 238-39. Linder argues that supervision of harvesting is necessary "only because the combination of low hourly wages and arduousness invites shirking." *Id.* at 238. The meager wages and the difficulty of the work, as well as the fact that many agricultural businesses employ foremen to supervise sharecroppers, suggest that these arrangements are strategies for businesses to keep their costs low that ultimately take advantage of workers. *Id.*; see also Wells, *Legal Conflict*, *supra* note 22, at 54 (discussing the use of sharecropping arrangements for labor-intensive produce in an effort to make farmworkers exercise greater care in their work).

<sup>79</sup> *Brandel*, 736 F.2d at 1118.

<sup>80</sup> *Id.* at 1116-17 (stating that parents train their children to "progress gradually to an active role in the harvesting").

<sup>81</sup> See Glader, *supra* note 8, at 1481.

<sup>82</sup> *Brandel*, 736 F.2d at 1118-19.

<sup>83</sup> *Id.* at 1118; see also Linder, *Employees*, *supra* note 29, at 452.

<sup>84</sup> *Brandel*, 736 F.2d at 1118 & n.8.

capital equipment according to its role at the different stages of the growing process.<sup>85</sup> As a distinct stage in the growing process, harvesting required only pails and gloves, the equipment the workers supplied.<sup>86</sup> Ignoring the equipment that was necessary to raise and market cucumbers and limiting its focus only to the equipment needed for harvesting, the court accepted that “the relatively small investment by the migrant workers did not require a finding of an employment relationship.”<sup>87</sup>

The opposing decisions in *Real* and *Brandel*, cases presenting similar facts, reveal the inconsistent and unfair results of using a case-by-case analysis of sharecropping agreements.<sup>88</sup> In addition, decisions such as the one in *Brandel* often leave poor farmworkers with no legal recourse; after the Sixth Circuit’s decision, many attorneys became reluctant to pursue farmworkers’ claims.<sup>89</sup> For as long as courts continue to apply the six-factor test on a case-by-case basis, many workers will be at risk of receiving an unfair decision under the application of the test established in *Brandel*.<sup>90</sup>

#### IV. EXISTING LEGISLATION

There are two statutes that establish rights and protections for immigrant farmworkers, the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Workers’ Protection Act (AWPA).<sup>91</sup> In addition, the Farm Labor Contractor Registration Act (FLCRA), which was repealed and replaced by AWPA in 1983, was an early attempt by Congress to regulate the conditions of

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<sup>85</sup> *Id.* at 1118. For example, *Brandel* used trucks for hauling produce to market, and “the hauling of [cucumbers] to market is a function separate from harvesting of the crop.” *Id.*

<sup>86</sup> *See id.* at 1119.

<sup>87</sup> *Id.* at 1118. The Sixth Circuit limited its conclusion to the specific facts of *Brandel*, noting that workers’ capital investment “may be important in other contexts.” *Id.* at 1119. *But see* LINDER, MIGRANT WORKERS, *supra* note 31, at 235. In his sweeping criticism of the *Brandel* decision, Linder accuses the *Brandel* court of “furnish[ing] the first solid judicial support for sharecropping, which turned out to be the high-water mark in agricultural employers’ efforts to persuade the courts that unskilled and capital-less workers are not employees.” *Id.*; *see also* Linder, *Employees*, *supra* note 29, at 468 (“The court overlooked “the defining characteristic of sharecropping,” that the crop, the market risk, and the profits are shared between the workers and the farm owner. This essential characteristic of sharing was absent from the *Brandel* arrangement.”).

<sup>88</sup> *See* Glader, *supra* note 8, at 1477–78.

<sup>89</sup> Linder, *Employees*, *supra* note 29, at 440 (finding that some attorneys in the Sixth Circuit no longer challenge sharecropping arrangements and instead advise workers to take tax deductions as self-employed individuals).

<sup>90</sup> For additional discussion of *Brandel* and criticism of the Sixth Circuit’s analysis, *see* Linder, *Employees*, *supra* note 29, at 440, 452, 468.

<sup>91</sup> Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1994); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801–1872 (1994).

employment for many immigrant farmworkers and to protect workers from abuses by large agricultural employers.<sup>92</sup>

### A. *The Fair Labor Standards Act*

Workers who are independent contractors are not considered to be employees under the FLSA, so employers using independent contractors are not required to comply with the FLSA's provisions.<sup>93</sup> Employers thus have an incentive to classify workers as independent contractors because this classification will be more convenient and less expensive for them.<sup>94</sup>

When the FLSA was originally enacted in 1938, the Act did not include farmworkers.<sup>95</sup> The 1966 amendments to the Act extended coverage to farmworkers; but even with this protection, different, less rigorous standards apply to farmworkers.<sup>96</sup>

One potential source of abuse under the FLSA stems from the family farm exemption.<sup>97</sup> Despite limits imposed upon child labor, the FLSA does not include children when they work for an "immediate family" member.<sup>98</sup> When farmworkers are classified as independent contractors, their children who work along with them are not considered to be employees working for the agricultural company.<sup>99</sup> Under this system of classification, "the child labor provisions and

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<sup>92</sup>Farm Labor Contractor Registration Act, Pub. L. No. 88-582, 78 Stat. 920 (1964) (repealed 1983). Varner, *supra* note 30, provides a comprehensive history of the FLCRA and the AWPA which I have relied upon here. Farm labor contractors, also referred to as "crewleaders," are often used by agricultural businesses to recruit farmworkers. Varner, *supra* note 30, at 435. Crewleaders are also classified as independent contractors, rather than employees, and are frequently given responsibility for protecting workers and for any FLSA violations that occur. Glader, *supra* note 8, at 1472. The structure of this employment relationship creates additional difficulties, however, when farmworkers later attempt to get wages they are owed from crewleaders who are often undercapitalized or simply hard to find. *Id.*; see also Michael G. Tierce, Note, *The Joint Employer Doctrine Under the Federal Migrant and Seasonal Workers Protection Act*, 18 RUTGERS L.J. 863, 868 (1987) (noting the FLCRA was enacted in response to abusive situations in relationships between crew leaders and farmworkers).

<sup>93</sup>Glader, *supra* note 8, at 1456. Examples of FLSA provisions that do not apply to independent contractors include "health and safety standards, unemployment and disability insurance, and . . . protections against oppressive child labor." *Id.*

<sup>94</sup>*Id.* For example, an employer of farmworkers is responsible for providing amenities such as field toilets and an adequate supply of drinking water. If a farmworker is classified as an independent contractor, however, the alleged employer is not responsible for these supplies or their costs. See Arnold, *supra* note 1.

<sup>95</sup>Glader, *supra* note 8, at 1460.

<sup>96</sup>*Id.* at 1462 (citing comments by Representative Edward R. Roybal that different, presumably lower, child labor, employee tax, and housing standards apply to farmworkers).

<sup>97</sup>29 U.S.C. § 213(a)(6)(B) (1994); Glader, *supra* note 8, at 1464-65.

<sup>98</sup>29 U.S.C. § 213(a)(6)(B).

<sup>99</sup>Glader, *supra* note 8, at 1464-65.

other protections afforded 'employees' do not apply...[so] children, who...work in the fields, are left unprotected from the abuses of oppressive child labor."<sup>100</sup>

*Donovan v. Brandel* further illustrates the problem of using a worker's classification as an employee or an independent contractor to determine the applicability of the FLSA's child labor prohibitions. In *Brandel*, the Secretary of Labor alleged violations of the FLSA's child labor provisions by the defendant farm owner.<sup>101</sup> The court's analysis focused on whether the farmworkers were employees of the defendant and thus protected by the FLSA.<sup>102</sup> Except for briefly mentioning that children played and worked in the fields with their parents, the Sixth Circuit never addressed the underlying issue of child labor in the case.<sup>103</sup> Upon concluding that the workers were not employees, the court ended its inquiry.<sup>104</sup> The independent contractor label insulated the defendant from liability for any child labor violations he may have committed under the FLSA.

The United States Supreme Court has interpreted broadly the terms of the FLSA to serve the remedial purpose of the Act.<sup>105</sup> Addressing the need to broadly construe the Act's terms, the Court noted that construing "employment" and "employee" narrowly "would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation."<sup>106</sup>

### B. Farm Labor Contractor Registration Act

The FLCRA sought to assist farmworkers by requiring crewleaders to register with the DOL.<sup>107</sup> By attempting to regulate crewleaders instead of the agricultural businesses that employed the crewleaders, the legislation seemed to

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<sup>100</sup> *Id.* at 1465 (footnote omitted). Glader explains that "[u]nder the family farm exemption, even children under twelve are allowed to work in the fields without any federal regulation of hours or working conditions.... So long as a child is employed by a parent on a farm nominally owned or 'operated' by the parent, and works outside of normal school hours, there is no age or hour limitation on the child's agricultural labor." *Id.* (footnote omitted). Glader advocates removing the family farm exemption so that agricultural companies with child employees will have to comply with the regulations that apply to other employers who hire children. *Id.* at 1487.

<sup>101</sup> *Brandel*, 736 F.2d at 1115; see also Glader, *supra* note 8, at 1480.

<sup>102</sup> *Brandel*, 736 F.2d at 1115.

<sup>103</sup> *Id.* at 1116-17.

<sup>104</sup> *Id.* at 1120.

<sup>105</sup> Glader, *supra* note 8, at 1469.

<sup>106</sup> *Id.* (quoting *United States v. Silk*, 331 U.S. 704, 712 (1946)).

<sup>107</sup> Varner, *supra* note 30, at 435-36. Registration requirements included "giving information regarding [the crewleader's] method of operation as a contractor...[and] provid[ing] proof of public liability insurance, or proof of financial responsibility, for all vehicles used in the business." *Id.* at 436 (footnote omitted).

leave farmworkers still open to abuses.<sup>108</sup> Amendments to the FLCRA in 1974 were unsuccessful at ending continuing abuses, and the Act was repealed in 1983.<sup>109</sup>

### C. Migrant and Seasonal Agricultural Worker Protection Act

The Migrant and Seasonal Agricultural Worker Protection Act replaced the FLCRA in 1983.<sup>110</sup> Most importantly, the AWPWA makes agricultural businesses as well as crewleaders responsible for complying with worker protection laws.<sup>111</sup> This shared responsibility resembles courts' use of the joint-employer doctrine in cases involving allegations of crewleader and agricultural business FLSA violations.<sup>112</sup>

The AWPWA divides agricultural workers into two separate categories, migrant and seasonal.<sup>113</sup> Migrant workers have to "be absent overnight" from their permanent homes while working, and seasonal workers perform agricultural work but do not need to be absent overnight.<sup>114</sup> The AWPWA workers' protections require agricultural employers to inform workers in writing about wages, the duration of employment, the nature of the work, and any other relevant conditions or benefits.<sup>115</sup> Employers also need to display in the workplace a DOL-provided poster that informs workers of their rights under the AWPWA.<sup>116</sup> Perhaps most importantly, the poster and the written statement about wages and conditions must be in the workers' language.<sup>117</sup>

Despite congressional attempts to prevent agricultural employers facing AWPWA actions from proffering the independent contractor defense,<sup>118</sup> agricultural

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<sup>108</sup> 29 U.S.C. §§ 1801–1872 (1994); *see also* Tierce, *supra* note 92, at 869 ("It is generally agreed that FLCRA failed to achieve its objective of improving the working conditions of the migrant farm worker."); Varner, *supra* note 30, at 435.

<sup>109</sup> Varner, *supra* note 30, at 436–37. Varner notes that although the amended FLCRA created a private right of action for farmworkers and expanded the Department of Labor's authority, agricultural businesses also attempted to add weakening amendments to the FLCRA. *Id.*

<sup>110</sup> *Id.* at 437. The AWPWA was passed in an effort to end abuses of farmworkers that had continued under the FLCRA. *Id.*

<sup>111</sup> *Id.*; *see also* Tierce, *supra* note 92, at 871.

<sup>112</sup> *See* Glader, *supra* note 8, at 1472–74 (discussing the joint-employer doctrine).

<sup>113</sup> 29 U.S.C. § 1802 (1994).

<sup>114</sup> *See* 29 U.S.C. §§ 1802(8)(A), (10)(A) (1994); *see also* Varner, *supra* note 30, at 438.

<sup>115</sup> 29 U.S.C. §§ 1821, 1831 (1994). This information must be in a written form. *Id.*

<sup>116</sup> 29 U.S.C. §§ 1821(b), 1831(b) (1994).

<sup>117</sup> 29 U.S.C. §§ 1821(g), 1831(f) (1994); *see also* Varner, *supra* note 30, at 439.

<sup>118</sup> Varner, *supra* note 30, at 440 ("Congress envisioned that defendant-growers would seek to avoid liability for AWPWA violations by [asserting] . . . that the worker is an independent contractor . . . . 'It was the intent of the congressional Committee that any attempt to evade the responsibilities imposed by AWPWA through spurious agreements among such parties be



employers have managed to “avoid liability for AWPAs violations” using this strategy.<sup>119</sup> Because the AWPAs only protects employees, an agricultural employer that convinces a court that a plaintiff is in fact an independent contractor cannot be held responsible for any alleged violations of the Act.<sup>120</sup> The relative success of the independent contractor defense is problematic, however, because the legislative history of the AWPAs indicates that the Act was to be interpreted like the FLSA, to achieve its “remedial purposes.”<sup>121</sup>

## V. EFFECTIVENESS OF CURRENT REGULATIONS AND REMEDIES

An analysis of the use of sharecropping arrangements that impose independent contractor status upon immigrant farmworkers reveals that such arrangements are simply a guise for agricultural employers to avoid responsibility for workers and liability for violations that occur during the course of the working relationship.<sup>122</sup> Despite repeated attempts to provide protection for workers,<sup>123</sup> abuses continue to be permitted under the independent contractor label. These continued abuses suggest that there are broader social forces that influence legislatures’ and courts’ approaches to handling an issue that overwhelmingly affects immigrants.<sup>124</sup>

### A. The Ineffectiveness of Current Legislation and Judicial Decisions

The relative success of the independent contractor defense indicates that the guidelines provided by the FLSA and AWPAs give courts too much flexibility when determining whether the label “independent contractor” or “employee” should be applied to a plaintiff farmworker.<sup>125</sup> As the Sixth Circuit’s decision in

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rendered meaningless . . . .”) (quoting H.R. REP. NO. 97-885, at 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4553).

<sup>119</sup> *Id.* (“Despite Congress’ warnings, nothing has prevented powerful growers from asserting superficial defenses to liability.”). Varner cites *Donovan v. Brandel* as one of the successful independent contractor defenses of AWPAs violations. *Id.* at 440 n.84.

<sup>120</sup> *Id.* at 440.

<sup>121</sup> *Id.* at 441 (noting that the broad construction given to terms such as “employ,” “independent contractor,” “employee,” and “employer,” under the FLSA “are also applicable to AWPAs provisions”).

<sup>122</sup> See generally Linder, *Employees*, *supra* note 29; Glader, *supra* note 8; Varner, *supra* note 30.

<sup>123</sup> The FLCRA and AWPAs were enacted in response to farmworker abuses.

<sup>124</sup> See generally Linder, *Employees*, *supra* note 29; Glader, *supra* note 8; Varner, *supra* note 30. The prevalence of nativism, defined as “intense opposition to an internal minority on the grounds of its foreign, . . . [or] ‘unAmerican,’ connections” suggests public apathy, if not actual dislike, toward immigrants and the employment difficulties they encounter in the United States. Valetk, *supra* note 38, at 147.

<sup>125</sup> See Linder, *Employees*, *supra* note 29, at 440–41 (advocating the adoption of a per se rule classifying migrant farmworkers as employees); see also Glader, *supra* note 8, at 1487–88.

*Brandel* indicates, courts applying the current six-factor economic realities test may reach the incorrect conclusion about a farmworker's status.<sup>126</sup>

Legislative and judicial remedies are particularly ineffective for assisting immigrant workers because many of the workers are also undocumented.<sup>127</sup> Violations of employee protection laws are more likely to occur when employers hire undocumented workers.<sup>128</sup> Because recently arrived, undocumented workers frequently have rural backgrounds and high illiteracy rates,<sup>129</sup> they become a part of the "underground economy,"<sup>130</sup> accepting jobs that most Americans will not take.<sup>131</sup> Not surprisingly, undocumented workers often seek employment in the agricultural industry.<sup>132</sup> Fearful of being discovered and deported, these workers are even less likely to assert their rights.<sup>133</sup>

### B. Public Attitudes About Immigration

Public attitudes about immigration are usually connected to overall economic conditions.<sup>134</sup> When the U.S. economy is slow, immigrants often become targets of blame and public outrage.<sup>135</sup> After substantial criticism of immigration policy

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<sup>126</sup> See *supra* notes 74–90 and accompanying text (discussing *Brandel v. Donovan*, 736 F.2d 1114 (6th Cir. 1984)).

<sup>127</sup> See Glader, *supra* note 8, at 1458 (noting that because these workers do not have access to legal services, they cannot protect themselves.).

<sup>128</sup> Gordon, *supra* note 39, at 416 (stating that even though the FLSA and other legislation, such as Title VII and state workers' compensation laws, include undocumented workers, these statutes have not helped these individuals).

<sup>129</sup> *Id.* at 413.

<sup>130</sup> *Id.* at 412. "Underground" jobs in agriculture, or in restaurants or factories, are "outside the realm of the law," meaning that employers do not comply with labor laws, do not pay taxes, and do not have mandatory insurance, workers' compensation, or disability benefits. Employers in the underground economy prefer to hire undocumented workers. *Id.* at 412–13.

<sup>131</sup> See Pete Hamill, *Rights, and Wrongs, of Passage*, TIME INT'L EDITION, Jan. 22, 2001, at 56.

<sup>132</sup> See *id.*

<sup>133</sup> Undocumented workers are unlikely to complain to employers or government agencies about violations of worker protection laws out of fear of losing their jobs as well as being deported. Gordon, *supra* note 39, at 414 n.27; see also Hamill, *supra* note 131, at 56 ("A worker without a green card is a worker who can be intimidated, cheated or defrauded."); Margot Roosevelt, *Illegal but Fighting for Rights*, TIME, Jan. 22, 2001, at 68–69 (AFL-CIO statement that "courageous undocumented workers who come forward to assert their rights should not be faced with deportation").

<sup>134</sup> Valetk, *supra* note 38, at 145 ("[T]he intensity of feelings toward immigrants is closely linked to economic conditions and suggest[s] that racial prejudice is stimulated in economic recessions. In addition, some have concluded that opposition to immigration rises and falls with the unemployment rate . . .").

<sup>135</sup> *Id.* at 144 ("Immigrants, as a politically weak group, are convenient and tangible targets for blame."). There seems to be little logic, however, in blaming immigrants for taking jobs

and calls for reforming immigration law,<sup>136</sup> the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) was passed in 1996<sup>137</sup> in response to anti-immigrant sentiment in the United States.<sup>138</sup>

The goal of immigration policy under the IIRIRA was to promote immigrants' self-sufficiency and to decrease their dependence on public assistance.<sup>139</sup> Providing public assistance, in particular to undocumented workers, has been especially unpopular.<sup>140</sup> It is far from certain, however, that receiving public assistance benefits is an incentive to move to the United States.<sup>141</sup> Nevertheless, it is clear that anti-immigration attitudes among the general population affect the way legislatures handle issues affecting immigrants.<sup>142</sup>

The policy behind the IIRIRA is also bound to affect the manner in which courts handle grievances brought by immigrant workers. A challenged sharecropping contract purporting to make an immigrant farmworker independent and self-sufficient appears consistent with the goals the IIRIRA endorses. A court

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from Americans because it is generally recognized that immigrant workers will accept work that American workers do not want. *See* Roosevelt, *supra* note 133, at 69.

<sup>136</sup> Valetk, *supra* note 38, at 144. United States immigration policy was criticized as being "a complex web of loosely related laws, regulations and procedures." *Id.*

<sup>137</sup> 8 U.S.C. §§ 1601–1646 (Supp. 1997).

<sup>138</sup> *See* Valetk, *supra* note 38, at 142–45.

<sup>139</sup> The statement of national policy set forth at the beginning of the statute makes the combined goals of increased self-sufficiency and decreased reliance upon public assistance clear:

[I]t is the immigration policy of the United States that aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and the availability of public benefits not constitute an incentive for immigration to the United States.

8 U.S.C. §1601(2) (1994); *see also* Valetk, *supra* note 38, at 148.

<sup>140</sup> Valetk, *supra* note 38, at 152.

<sup>141</sup> *Id.* at 153. As noted by Arnold and Parrish, many individuals enter into sharecropping contracts because they are seen as a way to develop independence and self-sufficiency. Parrish, *supra* note 7. This desire to be independent and self-supporting undercuts the argument that it is the promise of receiving public assistance that provides an incentive to immigrate. In addition, Valetk notes "push factors," such as poverty and unemployment, and the "pull factor" of U.S. employers' need for workers lead to Mexicans entering the U.S. in search of work and better opportunities. Valetk, *supra* note 38, at 160.

<sup>142</sup> *See* Gordon, *supra* note 39, at 416–17 (noting a lack of political will to create a system to protect workers). Exploitation of workers, particularly undocumented workers, results from government unwillingness to pass and administer protective labor laws. *Id.* at 427. Since immigrants are a politically weak group, they have limited power to represent their own needs, and it is unlikely that a significant number of American citizens will become advocates of immigrant farmworker protection laws. *See* Varner, *supra* note 30, at 468.

may favor an arrangement that fosters this independence, even if there are FLSA and AWPAs violations underlying the working relationship.<sup>143</sup>

In addition, common attitudes expressing anger or resentment toward immigrants also appear at times to color judicial perspectives of immigrant issues.<sup>144</sup> With legislatures and judges subject to anti-immigrant biases, it is not surprising that the AWPAs, as well as the FLSA, has failed to protect the group it was passed to assist.

### *C. Labor Reasons for Immigration*

Despite the prevalence of anti-immigrant sentiments, there are other factors that actually encourage immigration to the United States.<sup>145</sup> In certain industries and at certain times, there is a need for "cheap and permanent labor."<sup>146</sup> Agriculture is one such industry.<sup>147</sup>

For example, when there is a need for cheap labor at harvest time, the borders between the United States and Mexico open up more easily.<sup>148</sup> Even though there may be a demand for greater restriction of immigration, politicians may not be willing to respond in a way that will too drastically limit the number of available

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<sup>143</sup> The IIRIRA's policy may make it easier for a court to interpret a sharecropping contract as an opportunity for an immigrant to achieve financial independence, rather than as a scheme designed to benefit the alleged employer.

<sup>144</sup> See Glader, *supra* note 8, at 1478 (noting that "erroneous attitudes and insensitivity" toward farmworkers may affect litigation.); see also *id.* at 1481 (quoting a U.S. Department of Labor administrative law judge's comment that it is natural for children of migrant workers to accompany their parents in the fields rather than attend school because the children probably do not understand what is happening in their classrooms).

<sup>145</sup> See Valetk, *supra* note 38, at 160; see also Hamill, *supra* note 131, at 56 (noting that poverty pushes people from Mexico to immigrate to the United States, and the availability of jobs "calls them"); Tim Weiner, *In a World at Floodtide, An Effort to Lift the Gate a Bit*, N.Y. TIMES, Sept. 9, 2001, at 4-1 ("For decades, the economic gap between the two nations has driven millions of Mexicans to work for minimum wages or less in the United States. Americans reaped the rewards of that labor, so many ignored illegal immigration.").

<sup>146</sup> Valetk, *supra* note 38, at 160. U.S. businesses have always depended on "cheap foreign labor," such as slave labor in the South and Chinese railroad workers. *Id.* at 163. This dependence has continued. For example, the hotel industry in Nevada, as well as the agricultural industry in California, would be hard-pressed to find replacements for their employees who have immigrated, legally or not, from Mexico. Weiner, *supra* note 145.

<sup>147</sup> *Id.* at 160. One economic analysis posits that 'servile labor systems,' including sharecropping, depend upon the existence of three factors: "a class of large landholders, a shortage of labor, and a level of technology not so advanced that it provides incentives to mechanization." ROYCE, *supra* note 39, at 3. These three factors are present when large agricultural businesses are seeking workers to raise their more fragile crops, such as strawberries and cucumbers.

<sup>148</sup> Valetk, *supra* note 38, at 161. "[L]arge-scale agricultural production still depends on Mexican workers for its profits, and that is why the borders remain porous and why legislators have been slow to act." *Id.* at 163.

workers.<sup>149</sup> Politicians recognize that they “owe their seats to the patronage of right-wing manufacturing and agribusiness interests desirous of . . . low minimum wage and unfettered access to cheap, nonunion labor from the Third World.”<sup>150</sup>

A recent INS enforcement effort illustrates the power employers of immigrant workers, even undocumented workers, possess to bend immigration law in the employers’ favor. In September of 1998, the INS began investigating undocumented immigrants working in Nebraska slaughterhouses.<sup>151</sup> When the majority of the employees stopped coming to work, leaving the slaughterhouses understaffed, factory owners and ranchers complained about their significant financial losses.<sup>152</sup> As a result, “local politicians attacked the operation, and the INS backed down.”<sup>153</sup> State officials went as far as advocating a broad policy of amnesty for undocumented workers, and INS agents did not pursue undocumented workers in the slaughterhouses for over a year.<sup>154</sup>

The influence Nebraska slaughterhouse owners, ranchers, and politicians exerted over the INS ultimately protected the immigrant workers and their jobs. The power those employers exerted over the INS, however, is troubling. Avoiding compliance with immigration law suggests that employers are able to manipulate employment and labor regulations to their advantage as well.<sup>155</sup> Thus, even though an immigrant worker is supposed to be protected under the FLSA and the AWP, an employer may be able to justify infringements of those Acts by pointing to potential economic losses as the Nebraska ranchers and

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<sup>149</sup> *Id.* at 163–64. “[L]egislators know that illegal immigration is only marginally an issue of law enforcement and fundamentally a labor-market event.” *Id.* at 164.

<sup>150</sup> *Id.* at 164; *see also* ROYCE, *supra* note 39, at 3 (Maintenance of a labor system such as sharecropping also “requires . . . that landholders possess sufficient political power.”).

<sup>151</sup> Roosevelt, *supra* note 133, at 69. The INS subpoenaed employment records for nearly 5,000 workers and informed the slaughterhouses that agents would interview employees about “discrepancies in their documents.” *Id.*; *see also* Valetk, *supra* note 38, at 156–57 (discussing illegal aliens employed in the meat-packing industry).

<sup>152</sup> Roosevelt, *supra* note 133, at 69. Factory owners were significantly short of workers, and Nebraska cattle ranchers claimed that the resulting loss totaled twenty million dollars over eight months. *Id.*

<sup>153</sup> *Id.* This situation in Nebraska supports the proposition that there is no political will to create a system to protect undocumented workers at various levels of government. *See also* Gordon, *supra* note 39, at 416–17.

<sup>154</sup> Roosevelt, *supra* note 133, at 69; *see also* Gordon, *supra* note 39, at 417 (“[N]ational and state governments have failed to enforce labor laws protecting immigrant workers.”).

<sup>155</sup> Although the slaughterhouse employers were at odds with the INS in this case, employers also use the threat of INS investigations to control their undocumented employees. Workers who complain to employers about low wages or unsafe conditions frequently back down when the employer threatens “an INS bust.” Roosevelt, *supra* note 133, at 69. According to filmmaker Michael Moore, “[c]ompanies across America love illegal aliens until they get uppity and ask for a few more cents.” *Id.*; *see also* Gordon, *supra* note 39, at 414 n.27 (noting that employers do not worry about documentation when hiring workers but later threaten to use that illegal status against a worker complaining about unsafe conditions).

slaughterhouses did.<sup>156</sup> A strict policy of regulating immigration and undocumented workers directly conflicts with many employers' hiring needs, especially for less desirable jobs.<sup>157</sup>

Overall, public sentiment toward issues affecting immigrants is rather harsh. The incentive, particularly in agricultural states, to allow abuses of immigrant workers to continue seems to explain why attempts to protect workers, such as the FLCRA, have not worked. These two factors may also explain why the broad enforcement that the AWPA requires in order to be effective has not occurred.<sup>158</sup> Finally, protecting farmworkers simply may be seen as unnecessary due to the persistence of the myth that agricultural work is healthy, wholesome labor.<sup>159</sup> It is a common misconception that farm work, even when performed by children, is not "hard, difficult, or dangerous labor."<sup>160</sup> People do not protest unfair working conditions for farm laborers, nor do they demand regulation or improvement as they do of sweatshop labor.<sup>161</sup>

## VI. PROPOSALS

Helping immigrant farmworkers who enter into contracts with agricultural businesses to receive a fair deal could be achieved with legislative and judicial reform.<sup>162</sup> Given that employers have managed to avoid liability under existing statutes and that courts have been willing to enforce agreements under which farmworkers are independent contractors rather than employees, it appears that a different remedy is needed. Increasing public awareness of the difficulties

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<sup>156</sup> In the agricultural industry, "large-scale . . . production still depends on Mexican workers for its profits." Valetk, *supra* note 38, at 163; *see also* Gordon, *supra* note 39, at 417 (stating that laws regulating immigration and employment have made people afraid of losing jobs and being deported). Laws function this way because "[m]any in big business view the existence of a cheap, exploitable labor force as an economic necessity . . . [T]his sector would oppose a crack-down on labor violations against immigrant workers." *Id.*

<sup>157</sup> *See* Valetk, *supra* note 38, at 163; *see also* Gordon, *supra* note 39, at 417.

<sup>158</sup> *See* Varner, *supra* note 30, at 439.

<sup>159</sup> *See* Glader, *supra* note 8, at 1460.

<sup>160</sup> *Id.* at 1463. Agriculture "is the third most dangerous" industry after mining and construction. *Id.* The risk of injury from farm work is high and ranges from exposure to pesticides to the physically demanding and time-intensive nature of the work. *See id.*

<sup>161</sup> *Id.* at 1462. Glader focuses in particular on immigrant children working on farms, asserting that even though the public is generally outraged by child sweatshop labor, child agricultural labor does not upset people in the same way, and they do not seem to pay attention to the problem. *Id.* The public's acceptance of children performing farm work comes from the traditional image of the family farm where everyone contributes to labor. *Id.* at 1465.

<sup>162</sup> *Id.* at 1477 (stating that it would be better if courts or legislatures would create "a presumption that migrant farmworkers are employees and not independent contractors"); *see also* Linder, *Employees*, *supra* note 29, at 440-41 (advocating creation of a per se rule rather than case-by-case analysis of the various factors courts examine when determining the nature of an employment relationship).

farmworkers encounter is one way to bring attention to the issue and perhaps to encourage people to support, if not demand, greater protection and fairer treatment of immigrant farmworkers.<sup>163</sup> Ultimately, farmworkers should follow the example being set by immigrants in other industries; by organizing themselves or aligning themselves with existing unions,<sup>164</sup> such as United Farmworkers (UFW), farmworkers will be able to exert greater strength when dealing with large agricultural businesses.<sup>165</sup>

Amending current legislation or enacting an entirely new statute so that vulnerable agricultural workers have better protection is an option; however, the relative failure of past legislative efforts indicates that statutory reform is not the best solution. The FLSA was amended and the AWPAs were enacted specifically to address abuses endured by farmworkers, yet employers still manage to avoid liability under these Acts.<sup>166</sup> As the Supreme Court cautioned in *United States v. Silk*, employers have created "adroit schemes . . . at the expense of the benefits sought by the legislation."<sup>167</sup>

Any new legislation must clearly address the "scheme" of labeling farmworkers as independent in contracts and establish that an immigrant farmworker is not an independent contractor, but an employee subject to the protections the FLSA and the AWPAs provide.<sup>168</sup> In addition, new legislation also

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<sup>163</sup> See Varner, *supra* note 30, at 468 (stating that public outcry is needed). Public attitudes about immigrant issues, however, will be difficult to change.

<sup>164</sup> See generally Roosevelt, *supra* note 133, at 69–70 (describing deliverymen and hotel workers who received union assistance with their grievances against employers). "[Workers] are joining the unions that once stigmatized them as a threat to American jobs . . . [and] [n]o institution is defending them more eagerly than Big Labor . . ." *Id.* at 68. As one union leader stated, "We don't care about green cards . . . We care about union cards." *Id.*

<sup>165</sup> Susan Ferriss & George Raine, *Strawberry Fields Forever United?*, THE S.F. EXAMINER, Nov. 24, 1996, at B-1. United Farmworkers launched a campaign to organize strawberry pickers in California, many of whom are Mexican immigrants, and to publicize the plight of the workers, who sometimes stoop over strawberry plants for as long as twelve hours a day during the six- to eight-month growing season. *Id.* Owners of strawberry fields claimed that the union had "exaggerat[ed] descriptions of living and working conditions of the workers" and that only a "small percentage of growers" treated workers unfairly. *Id.* UFW organizers responded that growers and their field supervisors had "scared workers with warnings that companies might fold rather than negotiate UFW contracts." *Id.* In addition, the Strawberry Workers and Farmers Alliance, a group organized by employers and managed by a Los Angeles public relations firm, has held anti-union marches. *Id.*

<sup>166</sup> See Glader, *supra* note 8, at 1467 (noting that agricultural employers evade liability under the FLSA "by manipulating the formal designation of their relationship with their migrant workforce").

<sup>167</sup> *Id.* at 1469 (quoting *United States v. Silk*, 331 U.S. 704, 712 (1946)); see *supra* notes 110–11 and accompanying text.

<sup>168</sup> See Glader, *supra* note 8, at 1480 (arguing legislatures should make decisions about employee and independent contractor status because it is too important to leave for a case-by-case analysis).

needs to give courts better guidelines to follow than the six-factor test they normally apply when making employee-independent contractor determinations.<sup>169</sup> As the *Donovan v. Brandel* decision indicates, the six factors presently used do not always help courts in reaching the correct decision about a farmworker's status or an agricultural employer's liability.<sup>170</sup>

Deterrence of abuses by agricultural employers is another possible benefit of legislation establishing that immigrant farmworkers are employees. Farmworkers currently have few options for enforcing their rights,<sup>171</sup> so an employer's risk of being held accountable for a violation is minimal.<sup>172</sup> The unpredictability of the current six-factor test also discourages workers who are interested in bringing claims against employers.<sup>173</sup> If, however, agricultural employers incurred liability for treating immigrant farmworkers as independent contractors, those employers might be less willing to take that risk.

Any legislative attempt to correct current injustices perpetrated against immigrant farmworkers will require public support. Building greater public awareness of the hardships immigrant farmworkers endure<sup>174</sup> and changing attitudes about immigrants in the American workforce will undoubtedly be difficult.<sup>175</sup> Still, as the public becomes more informed about the violations employers commit against their immigrant workforces; as people realize that permitting employers to evade worker protection regulations threatens all employees, not only immigrant and undocumented workers; and as the public sees that the experiences of immigrants today resemble the experiences of

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<sup>169</sup> *Id.* at 1469 (Currently, "there is no legislative guidance as to when an agricultural worker properly is deemed to be an independent contractor rather than an employee.").

<sup>170</sup> See *supra* notes 79-92 and accompanying text (discussing *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984)).

<sup>171</sup> Glader, *supra* note 8, at 1458 (noting that workers do not have access to legal services, so they cannot protect themselves or have their rights enforced).

<sup>172</sup> See Linder, *Employees*, *supra* note 29, at 437 ("[An agricultural] company may calculate that the employees' immediate incentives to sue it are so small that the benefits of continuing violation of the FLSA exceed the costs . . . [and] farmworkers lose their resolve to resist such violations of the few employment rights they possess."); see also Glader, *supra* note 8, at 1477 (noting that the case-by-case analysis employed by courts makes it more likely that employers will risk using the independent contractor status because it is unlikely that a worker will go to the trouble of litigation).

<sup>173</sup> See LINDER, *MIGRANT WORKERS*, *supra* note 31, at 236.

<sup>174</sup> Public support of farmworker reform is crucial. As part of its attempts in 1996 to organize strawberry workers in California, the UFW created "an East Coast media blitz" to raise public awareness, and celebrities like Danny Glover and Edward James Olmos lent support to the "National Strawberry Commission for Workers' Rights" at the AFL-CIO's Washington office. See Ferriss & Raine, *supra* note 165, at B-1.

<sup>175</sup> See *supra* notes 139-40 and accompanying text (discussing recent anti-immigration sentiment).



people's own families who at one time were also immigrants,<sup>176</sup> there should be greater support for helping immigrants as they seek to establish themselves in the United States.

Raising public awareness and support for the plight of migrant workers was one of the goals of Mexican President Vincente Fox during his visit to the United States in September of 2001.<sup>177</sup> Fox insisted that the two governments agree by the end of 2001 to grant legal status to Mexican citizens working illegally in the United States.<sup>178</sup> Although the possibility of an immigration agreement had been discussed by the Bush and Fox administrations prior to Fox's speech,<sup>179</sup> the Bush administration has maintained that the issue of migrant workers in the United States is a complex one that will take time to implement.<sup>180</sup> One of those complexities is that relaxing immigration regulations for Mexicans will undoubtedly draw opposition, and anger, from other groups of immigrants.<sup>181</sup>

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<sup>176</sup> See Hamill, *supra* note 131, at 56. In his article, Hamill compares the experience of Mexicans attempting to enter the United States to the experience of his parents who emigrated from Northern Ireland in the 1920s. He writes that his parents "were driven by the same desires as all these young migrants [from Mexico]—to work at a decent wage, to live with dignity, to be sure that their children would be educated." Stating that more than four hundred "men and women died trying to cross [the] border in the year 2000 alone," Hamill asserts that U.S. and Mexican leaders "must insist on removing fear from the passage to the U.S." Most significantly, Hamill stresses "[t]hose of us who are children of the European migration can play an important role in this process, pressuring American politicians to become instruments of welcome, not rejection. That means we must see the new arrivals for what they are, links to our own biographies." *Id.*

<sup>177</sup> See Ginger Thompson, *Mexican President Urges U.S. to Act Soon on Migrants*, N.Y. TIMES, Sept. 6, 2001, at A1. In his speech, Fox contended that "immigrants have fueled economic growth" and that the United States should "'build new conditions of fairness' for undocumented Mexican immigrants 'whose hard work is a daily contribution to the prosperity of [the United States].'" *Id.*; see also Don Gonyea, *President Vincente Fox's Visit to the White House* (NPR All Things Considered radio broadcast, Sept. 5, 2001) ("Fox has made it a goal of his to negotiate some sort of legal status for [Mexicans currently living in the United States]."), available at [www.npr.org/ramfiles/atc/20010905.atc.ram](http://www.npr.org/ramfiles/atc/20010905.atc.ram).

<sup>178</sup> Thompson, *supra* note 177.

<sup>179</sup> Gonyea, *supra* note 177 (noting that during the past year, representatives of the two governments have met repeatedly to discuss migration issues).

<sup>180</sup> *Id.* Attorney General John Ashcroft has participated in meetings on a migration agreement with Mexican government representatives. *Id.* Although Ashcroft assured interviewers after Fox's speech that the matter is a priority, he gave no indication of when an agreement will be reached. *Id.*

<sup>181</sup> See Thompson, *supra* note 177; see also Weiner, *supra* note 145. Many people attempting to enter the United States "see Mexico's border as the most open path to the United States." *Id.* In the last ten years, international smugglers "increasingly used Mexico as the next-to-last stop in round-the-world routes to the United States." *Id.* The Mexican government has been cooperating with United States officials to break up these international smuggling systems, which transport people from as far away as China and Pakistan to this country via Mexico. *Id.* at 4-4.

Considering the difficulty of creating sufficient public support and reforming legislation, immigrant farmworkers may be best served by asserting their rights collectively, as immigrant workers in other industries have done.<sup>182</sup> By seizing upon the interest of unions,<sup>183</sup> such as UFW, in recruiting immigrant farmworkers, these workers will have greater power when bargaining with agricultural employers.<sup>184</sup> Even if farmworkers independently organize themselves and work together to assert their rights as employees, large agricultural businesses would not be able to take advantage of the immigrant workers as easily as the businesses do now.<sup>185</sup>

Increasingly, unions have been focusing their recruiting efforts upon the service industries.<sup>186</sup> With immigrants comprising a significant portion of the service sector, they are likely recruits for unions seeking to increase membership numbers.<sup>187</sup> Recruitment efforts have been particularly strong in the agricultural industry. The AFL-CIO has supported the UFW's "ongoing campaign" to convince strawberry workers to become union members.<sup>188</sup> The union has also negotiated contracts on behalf of workers raising vegetables, wine grapes, and roses.<sup>189</sup> The UFW's interest in immigrant agricultural workers reflects the increasing desire unions in general have to include immigrants among union ranks.<sup>190</sup>

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<sup>182</sup> See Roosevelt, *supra* note 133, at 68 (describing recent victories achieved by illegal immigrants under labor and civil rights laws). In Manhattan, four hundred immigrants working for a delivery company joined a labor union and won three million dollars in back pay from their employer. *Id.* The Hotel Employees and Restaurant Employees Union posted bonds for undocumented workers who were turned over to the INS by their employer after voting to join the union. *Id.* at 69-70.

<sup>183</sup> See Ferriss & Raine, *supra* note 165; Roosevelt, *supra* note 133, at 68.

<sup>184</sup> See Ferriss & Raine, *supra* note 165; Roosevelt, *supra* note 133, at 68-70.

<sup>185</sup> See WELLS, STRAWBERRY FIELDS, *supra* note 22, at 110 (discussing community-based organization of Japanese sharecroppers); see also Gordon, *supra* note 39, at 428-37 (describing the Workplace Project on Long Island and its efforts to help immigrant workers enlist the aid of co-workers, so they can confront employers collectively when addressing a particular grievance).

<sup>186</sup> See Roosevelt, *supra* note 133, at 68. This focus upon service industries is a "practical" way for the unions to bolster their memberships, which have suffered losses from decreases in unionized manufacturing. *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* ("The AFL-CIO . . . has poured resources into organizing efforts heavily focused on immigrants."). The UFW, "[f]ueled by AFL-CIO money and an unusually high level of support from AFL-CIO President John Sweeney" began campaigning among strawberry workers in 1996, distributing "slick booklets decrying workers' wages and examples of abysmal living conditions." *Id.*

<sup>189</sup> Ferriss & Raine, *supra* note 165, at B-1. In the mid-1990s, UFW "won thirteen elections and negotiated eleven contracts" for various agricultural workers. *Id.*

<sup>190</sup> See *supra* notes 165-66. See generally Roosevelt, *supra* note 133, at 68.

Though joining the union would benefit immigrant farmworkers, there are, however, obstacles to many farmworkers becoming union members. Historically, unions and immigrants have not gotten along well.<sup>191</sup> When unions have organized immigrant-dominated industries, the unions' goals have been to negotiate better contracts for workers, rather than work to improve conditions or to "achieve social justice."<sup>192</sup> The strained relationship between unions and immigrants is reflected by the disbelief of some workers that a union will help them.<sup>193</sup>

Another significant obstacle to unionization involves overcoming workers' fears that employers will retaliate against individuals who support union membership. These fears are not unfounded. In August of 1995, almost ninety percent of the workers at VCNM Farms, which grows strawberries in Salinas, California, voted in support of UFW representation.<sup>194</sup> The following week, VCNM destroyed a quarter of its crop; a month later, VCNM fired all of its workers.<sup>195</sup> As a result of the employer's action, the union did not hold elections the following year.<sup>196</sup> Undoubtedly, it would be difficult to convince workers, who rely financially upon growers, to support a union if the workers would risk losing their jobs.<sup>197</sup>

Employers, however, have been held accountable for their retaliatory actions. The California Agricultural Labor Relations Board fined VCNM Farms for destroying its produce after workers voted for the union.<sup>198</sup> Recently, a meat industry employer was found to have violated labor laws for intimidating workers who wanted to vote in the United Food and Commercial Workers' Union elections.<sup>199</sup> These findings of employer liability for intimidating immigrant

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<sup>191</sup> See Gordon, *supra* note 39, at 423.

<sup>192</sup> *Id.* at 426.

<sup>193</sup> See Ferriss & Raine, *supra* note 165, at B-1. Many strawberry farmworkers opposed the UFW's recruitment efforts, alleging that the union's activities were "damaging the image of the \$600-million-dollar-a-year industry on which [the workers] depend." *Id.* Other workers were frustrated by the union's inability to guarantee workers' jobs. *Id.*

<sup>194</sup> *Id.* Four hundred strawberry workers participated in the election. *Id.* Their demands included implementing a seniority system, providing medical benefits, and stopping sexual harassment of female workers. *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* One union spokesperson acknowledged that "having an election and not guaranteeing those workers would become partners in the industry" would be "irresponsible." *Id.*

<sup>197</sup> See Roosevelt, *supra* note 133, at 68. Despite maintaining its presence among strawberry workers in California for five years, the UFW has enrolled less than one thousand of the estimated twenty thousand workers. *Id.*

<sup>198</sup> Ferriss & Raine, *supra* note 165, at B-1. The \$113,000 fine the company paid may serve as a deterrent against future destruction of crops, but this fine did little to assist the workers who lost their jobs. *Id.*

<sup>199</sup> See Smithfield Packing Co., Tar Heel Div., No-11-CA-15522, 2000 NLRB Lexis 905 (Dec. 15, 2000); see also Roosevelt, *supra* note 133, at 68. Smithfield Packing Co. is a pork-

workers hopefully will be an incentive to workers to support unions, because workers may have greater assurance that employers will not retaliate against union members.

As an alternative to joining a union, other immigrant workers have succeeded in improving working conditions by involving fellow workers in their complaints against employers.<sup>200</sup> This approach would require some outside assistance, most likely through legal aid organizations such as California Rural Legal Assistance.<sup>201</sup> Already, one legal aid office has succeeded in helping immigrants with labor issues by involving other workers when the immigrants confront employers with grievances.<sup>202</sup>

At the Workplace Project on Long Island,<sup>203</sup> legal aid attorneys counsel immigrant workers in assorted service industries to enlist the aid of other workers when bringing grievances to an employer's attention.<sup>204</sup> Bringing complaints as a group to an employer strengthens the employees' position and also is a benefit if the workers choose to bring a lawsuit against the employer.<sup>205</sup>

These organized groups of workers function like informal unions.<sup>206</sup> By encouraging workers in specific fields to work together<sup>207</sup> and informing workers of their rights through community outreach programs,<sup>208</sup> the Workplace Project hopes to make workers less dependent upon legal services, which are not always accessible, and to increase workers' reliance upon their own skills when dealing

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processing plant in North Carolina. *Id.* During a union drive in 1997, the company fired labor activists, had police officers stationed in its parking lot on election day, and told workers that the union would turn them into the INS. *Id.*

<sup>200</sup> Gordon, *supra* note 39, at 428–37.

<sup>201</sup> See *supra* note 4 (discussing the work California Rural Legal Assistance does on behalf of sharecroppers).

<sup>202</sup> See generally Gordon, *supra* note 39, at 428–37 (describing the Workplace Project on Long Island and its efforts to address problems faced by immigrant workers and to help them enlist the aid of other workers).

<sup>203</sup> See *id.* at 428. The Workplace Project is one of an increasing number of “workers centers [sic]” or “community-based membership organizations that organize workers to fight widespread labor exploitation.” *Id.*

<sup>204</sup> *Id.* at 443 (advocating a group effort by as many employees as possible to address an employment problem in order for the action to be most effective).

<sup>205</sup> *Id.* at 440 (“[L]awsuits that are not backed by a strong group of workers often flounder because they are vulnerable to the pitfalls of the legal process.”).

<sup>206</sup> *Id.* at 429 (“These centers are part of an effort to build a new labor movement, to lead the fight against exploitation of immigrants and other working-class people.”).

<sup>207</sup> *Id.* at 430–33.

<sup>208</sup> *Id.* at 433–37. Education efforts include distributing information in Spanish about workers' rights and running workshops that help participants formulate ways to organize their co-workers. *Id.*

with employers' exploitative policies.<sup>209</sup> Some workers have succeeded in receiving past due wages and have attracted positive community attention when they confronted an employer as a group but without any legal representation.<sup>210</sup>

Similar informal, community-based organizations have already been used by sharecroppers with some success.<sup>211</sup> Japanese farmers who sharecropped strawberries in California were assisted by their "group solidarity and organization."<sup>212</sup> In addition, Japanese organizations helped farmworkers "in their [workers'] relations with landowners, helping them find land, setting maximum rent levels and minimum wage levels that Japanese should accept, and mediating disputes between them and the landlords."<sup>213</sup> By uniting as a community, immigrant farmworkers will be able to negotiate for more equitable terms when entering into contracts with agricultural employers, similar to the way Japanese sharecroppers once did. A farmworker will also be able to rely on community support if a dispute arises with an employer.

Organizing group action by immigrant farmworkers will be challenging, but these informal, community-based unions may be more effective for immigrant farmworkers.<sup>214</sup> Despite the obstacles, group action by immigrant farmworkers when entering contracts to work, as well as when bringing grievances to agricultural employers, would significantly strengthen workers' positions.<sup>215</sup>

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<sup>209</sup> *Id.* at 438–39 ("[A] successful experience with legal services taught the worker nothing more than reliance on legal services . . . . Once a problem has been defined as part of the legal sphere, people are reluctant to take it back into their own hands.").

<sup>210</sup> *Id.* at 432. Gordon recounts the experience of a landscape worker, Miguel Alejandro Guevara, whose employer had not paid him for nine days of work. *Id.* The employer claimed that because the owner of the home where Guevara did the landscaping had not paid his bill, Guevara would not be compensated. *Id.* Accompanied by sixteen other landscapers, Guevara confronted the employer in front of one his customers. *Id.* The employer eventually promised to pay Guevara his wages, and the customer threatened to withhold payment from the employer if he did not keep his promise. *Id.*

<sup>211</sup> WELLS, STRAWBERRY FIELDS, *supra* note 22, at 110. Wells cautions that the success of Japanese sharecroppers led to the adoption of Alien Land Laws in California and other western states. *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> See Gordon, *supra* note 39, at 422 n.53 (citing various law review articles that note the lack of legal resources available to immigrant workers). Although farmworkers would need some initial support from a legal aid group, following the model established by the Workplace Project would enable workers to assume leadership roles in organizational efforts. Thus, as farmworkers grew more adept at representing themselves and recruiting other workers facing similar dilemmas, the workers would become less dependent upon limited legal resources. See *id.*

<sup>215</sup> See *id.* at 443.

## VII. CONCLUSION

Although organizing, either through established unions or community-based groups, poses many challenges for immigrant farmworkers, it may be the best course of action. Lacking more comprehensive protective legislation and consistent enforcement of existing law by the courts, immigrant farmworkers have to assume an active role in guaranteeing that they are treated fairly by agricultural employers. Ironically, it is only by achieving a level of independence, either by accepting the help of established unions or following the example of immigrant workers in other industries, that immigrant farmworkers will be able to protect themselves as employees.